

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) While working for the respondent on October 12, 1990, the claimant sustained a personal injury by accident arising out of and in the course of her employment. As a direct result of such personal injury, the claimant's ability to perform work in the open labor market has been reduced by forty percent (40%) and her ability to earn comparable wages has been reduced by thirty-three percent (33%). Following the case of Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), the Appeals Board finds, pursuant to the facts and circumstances of this particular case, that both factors shall be given equal weight and therefore, finds and concludes that the claimant has suffered a thirty-six and one-half percent (36.5%) permanent partial general work disability.

The claimant, Sandra Flurry, commenced working as a Storekeeper II for the respondent, Winfield Correctional Facility in January of 1990. Her job duties consisted of receiving, storing and issuing out necessities to the inmates housed at the correction facility, such as food, clothing, soap, and toothpaste.

On October 12, 1990, the claimant climbed up a stepladder to straighten a stack of wax bean cans when the stack fell, causing her to lose her balance and she fell from the stepladder to the floor. The claimant was taken by ambulance to William Newton Memorial Hospital in Winfield, Kansas, where she was admitted overnight for observation. Respondent provided medical treatment for the claimant's injury to her low back with Jorge Sturich, M.D., of Winfield, Kansas, for approximately one week. Dr. Sturich then referred the claimant for further treatment with Paul D. Lesko, M.D., a board certified orthopedist in Wichita, Kansas. Dr. Lesko provided conservative treatment for the claimant in the form of hot packs, physical therapy, muscle relaxers and anti-inflammatory medication. She was returned to her regular job as a Storekeeper II in December of 1990 by Dr. Lesko, with restrictions.

Claimant continued to work in her regular position with increasing symptoms until June of 1992. During this period of time, she returned to Dr. Sturich, who continued conservative treatment. Finally, the respondent transferred the claimant to an accommodated position of Office Assistant that required no stair climbing but reduced her pay from a Range 13 to a Range 11.

Even though the Office Assistant position was accommodated to eliminate stair climbing, the position required pulling of files which entailed bending and stooping. This activity caused the claimant increased pain. Dr. Sturich eventually referred the claimant to Dr. James Hay for pain management. Dr. Hay provided injections into the muscle and

nerve areas without long-term relief. Dr. Sturich finally took the claimant off work from the Office Assistant job.

While the claimant was off work, she was terminated by the respondent for violating the work rule prohibiting an employee from corresponding with an inmate.

Dr. Sturich last saw the claimant in March of 1993 and at that time he prescribed muscle relaxers and anti-inflammatory medication. He advised her to find other type of employment and restricted her from employment which required repetitive pulling, pushing, stair climbing, bending over, or reaching out. Dr. Lesko also placed limitations on the claimant as evidenced by a Physician Return to Work Record completed by him dated August 27, 1991, which restricted the claimant to sedentary work performed with occasional standing and no stooping, bending, and no climbing stairs or ladders.

Claimant testified that she could not perform the job duties of either the Storekeeper II or Office Assistant within the restrictions established by both Dr. Sturich and Dr. Lesko. She further testified that since she had been terminated by the respondent, the only employment she had been able to secure was a temporary job with Wesley Hospital filing records. She was unable to work half of the time during this temporary job because her condition got worse from the bending and lifting requirements of the job.

Dr. Ernest R. Schlachter, a general medical practitioner, at the request of the claimant's attorney, examined and evaluated the claimant on June 4, 1993. Dr. Schlachter took a history from the claimant and performed a physical examination. All of the physical findings from an objective standpoint were negative. However, the physical examination resulted in numerous subjective complaints of pain as it revealed localized maximum pain over the L5-S1 interspace going into the sacroiliac joint. It is Dr. Schlachter diagnosis that the claimant suffers from chronic lumbar sacral sprain which was caused by her fall while working for the respondent on October 12, 1990.

In accordance with the AMA Guides, Third Edition, Revised, Dr. Schlachter is of the opinion that the claimant has an eight percent (8%) permanent partial impairment of function to the body as a whole due to her work-connected injury. She is permanently restricted to no repetitive bending, kneeling or squatting and no repetitive lifting more than 30 pounds and single lifts of more than 40 pounds. She should obtain a job where she can sit part time and stand part time. It was Dr. Schlachter's further opinion that claimant could not do either the Storekeeper II or the Office Assistant job for the respondent as a result of her injuries.

At the request of the claimant's attorney, the claimant was interviewed by Jerry D. Hardin, M.S., Human Resource Consultant, for purposes of evaluating claimant for work disability. Mr. Hardin personally interviewed the claimant and obtained information from her concerning her education, training and past work experience. He reviewed medical restrictions imposed by Dr. Schlachter in his report dated June 4, 1993, and medical restrictions imposed by Dr. Paul Lesko in his report of August 27, 1991.

Utilizing Dr. Schlachter's restrictions, it was Mr. Hardin's opinion that the claimant would be able to work in sedentary and light categories and some work in the medium category. Based on these restrictions, the claimant's ability to perform work in the open labor market had been reduced by forty to forty-five percent (40-45%). With respect to Dr. Paul Lesko's restrictions, Mr. Hardin opined that claimant was limited to sedentary jobs.

Thus, utilizing Dr. Lesko's restrictions, the claimant's ability to perform work in the open labor market has been reduced by seventy-five to eighty percent (75-80%).

In regard to the claimant's ability to earn comparable wages, Mr. Hardin compared claimant's pre-injury wage that was given to him at that time of \$309.92 per week to a \$240 per week post-injury wage and concluded that the claimant's ability to earn comparable wages in the open labor market had been reduced by twenty-three percent (23%).

The Administrative Law Judge in this case found that the claimant had met her burden of proof in establishing work disability. A thirty-one and one half percent (31.5%) work disability was awarded by giving equal weight to a forty percent (40%) labor market loss and a twenty-three (23%) comparable wage loss based on Jerry D. Hardin's opinion using Dr. Schlachter's medical restrictions.

The respondent argues that the claimant was returned to an accommodating job of an Office Assistant at a comparable wage. She was terminated from this employment because of breaking work rules of the respondent. The claimant has failed to overcome the presumption of no work disability and should be limited to an award of functional impairment of eight percent (8%) as concluded by Dr. Schlachter.

It is the claimant's position in this case that the finding of the Administrative Law Judge that the claimant's loss of ability to perform work in the open labor market has been reduced by forty percent (40%), is fair and reasonable based on the opinion of Jerry Hardin, utilizing Dr. Schlachter's medical restrictions. However, the claimant argues that the twenty-three percent (23%) finding of the Administrative Law Judge in reference to the claimant's loss of ability to earn comparable wages should be increased to thirty-three percent (33%). The twenty-three percent (23%) figure was arrived at by Mr. Hardin using a pre-injury wage of \$309.92 per week. The stipulated pre-injury wage is \$355.78 per week and should be compared to the \$240.00 post-injury wage for a thirty-three (33%) loss of claimant's ability to earn comparable wages. Therefore, by giving equal weight to both factors pursuant to the Hughes formula, the award in this case should be a thirty-six and one-half percent (36.5%) work disability.

In the instant case, the presumption of no work disability as provided by K.S.A. 1992 Supp. 44-510(e)(a) does not apply because it was not established that the accommodated Office Assistant job paid a comparable wage. In addition, claimant was physically unable to satisfactorily perform the job duties; treating and evaluating doctors all indicated that she could not do either the job duties of the Storekeeper II or the job duties of the Office Assistant within her medical restrictions; and Jerry Hardin, Human Resource Counselor, concluded she has both a loss of ability to perform work in the open labor market and a loss of ability to earn comparable wages as a result of her injuries. See Locks v. Boeing Co., 19 Kan. App. 2d 17 (1993).

The respondent did not present evidence to contradict the claimant's testimony nor the testimony of the claimant's experts. Uncontradicted evidence which is not improbable or unreasonable and unless shown to be untrustworthy cannot be disregarded and should be ordinarily regarded as conclusive. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978).

The Appeals Board on review of an award of an administrative law judge has the authority to increase or diminish an award of compensation. K.S.A. 44-551(b)(1).

Considering the whole evidentiary record, the Appeals Board finds and concludes that the Administrative Law Judge's finding that the claimant's ability to perform work in the open labor market has been reduced by forty percent (40%) based on Jerry D. Hardin's expert opinion utilizing Dr. Schlachter's medical restrictions should be affirmed. However, the Administrative Law Judge's further finding that the claimant's ability to earn comparable wages has been reduced by twenty-three percent (23%) should be increased to thirty-three percent (33%) based on a pre-injury stipulated weekly wage of \$355.78 instead of the weekly wage of \$309.92 used to calculate the twenty-three percent (23%). Pursuant to the Hughes formula of giving equal weight to each of these factors, the claimant is entitled to a thirty-six and one-half percent (36.5%) permanent partial general disability award based on work disability.

(2) The Appeals Board further adopts and incorporates herein the findings of Administrative Law Judge Shannon S. Krysl as set forth in her Award dated December 20, 1993, to the extent that they are not inconsistent with the findings and conclusions expressed in this award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated December 20, 1993, is modified as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR OF the claimant, Sandra Flurry, and against respondent, the State of Kansas and the insurance carrier, the State Self-Insurance Fund.

The claimant is entitled to 57.1 weeks temporary total disability at the rate of \$237.20 per week or \$13,544.12 followed by 357.9 weeks at \$86.58 or \$30,986.98 for a thirty-six and one-half (36.5%) permanent partial general body disability, making a total award of \$44,531.10.

As of March 8, 1994, there would be due and owing to the claimant 57.1 weeks temporary total compensation at \$237.20 per week in the sum of \$13,544.12 plus 120.61 weeks permanent partial compensation at \$86.58 per week in the sum of \$10,442.41 for a total due and owing of \$23,986.53 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$20,544.57 shall be paid at \$86.58 per week for 237.29 weeks or until further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum of \$350.00 upon proper presentation of the statement.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The attorney fees are approved subject to provisions of K.S.A. 44-536.

The fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed against respondent to be paid direct as follows:

Todd Reporting	
Deposition of Jerry D. Hardin, M.S.	\$227.40
Deposition of Ernest R. Schlachter, M.D.	\$103.50
Barber & Associates	
Transcript of regular hearing	\$146.90

IT IS SO ORDERED.

Dated this ____ day of March 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Robert R. Lee, 1861 N. Rock Road, Wichita, KS 67206
Michael T. Harris, 125 N. Market, Wichita, KS 67202
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director